constitutional text in light of "history, practice, precedent, and the structure of the Constitution"); *United States* v. *Classic*, 313 U.S. 299, 316 (1941) ("If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.") (citation omitted); *Bell* v. *Maryland*, 378 U.S. 226, 288-289 (1964) (Goldberg, J., concurring) ("Our sworn duty to construe the Constitution requires * * * that we read it to effectuate the intent and purposes of the Framers."); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 418-419 (1819) (declining to attribute a "strict and rigorous meaning" to the "necessary and proper" clause that would have conflicted with "the intention of the convention" that framed the Constitution). In particular, they demonstrate that the Framers would not have intended to preclude appointment of a Member of Congress to an Executive Branch position without regard to whether she actually benefits from an increase in compensation that occurred during her congressional term.

The first version of what would become the Ineligibility Clause, set out in the Virginia Plan's fourth and fifth resolutions at the Constitutional Convention, would have categorically barred Members of Congress from holding other federal office during and for some period following their term of election. 1 *The Records of the Federal Convention of 1787*, at 20-21 (Max Farrand ed., 1911) (*Records*). That proposal reflected the desire to "shut the door against corruption," lest Members of Congress "make or multiply offices, in order to fill them." *Id.* at 380.

A counter-proposal offered by Nathaniel Ghorum of Massachusetts would have eliminated the Ineligibility

Clause altogether, out of concern that a bar on the appointment of Members of Congress to other offices would limit the number of capable persons who could serve in government. 1 *Records* 375-376. James Wilson, a delegate from Pennsylvania and an original Member of this Court, opposed the measure on the basis that it would "disqualify a good man from office," *id.* at 379, when "we ought to hold forth every honorable inducement for men of abilities to enter the service of the public," *id.* at 380. Alexander Hamilton, expressing the view that the interests of government would be positively served by the appointment of Senators and Representatives to high office, declared himself to be "against all exclusions and refinements, except only in this case; that when a member takes his seat, he should vacate every other office." *Id.* at 382; see 2 *Records* 286 (Gouverneur Morris was "ag[ainst] rendering the members of the Legislature ineligible to offices. He was for rendering them eligible ag[ain] after having vacated their Seats by accepting office."); *id.* at 283-284 ("Mr. Pinkney argued that * * * making the members ineligible to offices was * * * improper as their election into the Legislature implied that they had the confidence of the people; that it was *inconvenient*, because the Senate might be supposed to contain the fittest men[;] * * * that it was *impolitic*, because the Legislature would cease to be a magnet to the first talents and abilities.")

James Madison argued for a "middle ground between an eligibility in all cases, and an absolute disqualification." 1 *Records* 388. As Madison explained:

> Some gentlemen give too much weight and others too little to this subject. If you have no exclusive clause, there may be danger of creating offices or augmenting the stipends of those already created, in order to

> gratify some members if they were not excluded. Such an instance has fallen within my own observation. I am therefore of opinion, that no office ought to be open to a member, which may be created or augmented while he is in the legislature.

Id. at 380. In Madison's view, "the unnecessary creation of offices, and increase of salaries, were the evils most experienced," so "if the door was shut ag[ainst] them, it might properly be left open for the appoint[ment] of members to other offices as an encouragm[ent] to the Legislative service." *Id.* at 386. Like Hamilton, Madison was of the view that "an absolute disqualification" based on legislative service "would be an objection with the most capable citizens." *Id.* at 389.

The Constitutional Convention thus sought to avoid a temptation to legislate the creation of unnecessary offices or to increase executive salaries in order to "gratify" Members who might then gain appointment. At the same time, the Convention sought to avoid a regime that would broadly disqualify Members of Congress from appointment to executive office. Those dual purposes are served if a Member of Congress does not become the beneficiary of an increase in emoluments for an Executive Branch office that took effect but was then rescinded during her Congressional term. In light of the customary (indeed automatic, see 5 U.S.C. 5303(a)) nature of cost-of-living salary adjustments, the construction advocated by appellant would risk creating the categorical bar from Executive Branch service that the Convention rejected—especially for Senators given their six-year terms.

The historical practice of the political Branches reinforces this understanding. On at least seven occasions since the Civil War, Congress has rolled back the salary

of an office, and a Member of Congress has been nominated and confirmed to a position that the Ineligibility Clause otherwise would have barred him or her from assuming. In 1876, Senator Lot Morrell was nominated and confirmed as Secretary of the Treasury following the rollback of the annual salary for that office, which, during his Senate term, had been raised from $8000 to $10,000 and then returned to $8000. See 119 Cong. Rec. 38,317 (1973).

In 1909, Congress reduced the salary of the Secretary of State so that Senator Philander Knox could be appointed to the office. During Knox's term in the Senate, Congress had raised the annual salary of cabinet positions from $8000 to $12,000. Act of Feb. 26, 1907, ch. 1635, 34 Stat. 948. After President Taft expressed an intention to nominate Knox, legislation was introduced in Congress to reduce the salary of the Secretary of State to $8000. See Act of Mar. 4, 1909, ch. 297, 35 Stat. 861. After a vigorous debate over the meaning of the Ineligibility Clause, the view that Knox was constitutionally eligible to serve at the lower salary prevailed. 43 Cong. Rec. 2390-2415 (1909); *id.* at 2205 (Senate); *id.* at 2415 (House). Knox was confirmed unanimously. 44 Cong. Rec. 6-7 (1909).

In 1973, President Nixon expressed his intent to nominate Senator William Saxbe to be Attorney General. 119 Cong. Rec. at 38,316. During Saxbe's Senate term, the annual salary of the Attorney General had increased from $35,000 to $60,000. *Id.* at 38,317. The President sought legislation to reduce the salary to $35,000, which Senator Robert Byrd opposed on the ground that it would be insufficient to satisfy the Ineligibility Clause. See *Hearing Before the Comm. on the Judiciary on S. 2673*, 93d Cong., 1st Sess. (1973) (*1973*

Judiciary Comm. Hearing); 119 Cong. Rec. at 37,017-37,026; see also *id.* at 38,315-38,348 (Senate debate); *id.* at 39,234-39,245 (House debate). After debate of the Ineligibility Clause issue, Congress passed the legislation by overwhelming majorities. See *id.* at 39,245 (House); *id.* at 38,347-38,348 (Senate). The Senate confirmed Saxbe by a 75-10 vote. *Id.* at 42,018.

In 1975, when President Ford appointed Representative Robert Casey to a seat on the Federal Maritime Commission, Congress passed legislation that reduced the salary of Casey's seat, but not the other Commission seats, for the duration of Casey's congressional term. Act of Dec. 31, 1975, Pub. L. No. 94-195, 89 Stat. 1108; 121 Cong. Rec. 40,811 (1975). Casey was confirmed by voice vote with recorded opposition from only Senator Byrd. *Id.* at 42,158.

By 1980, even Senator Byrd apparently had come to accept the view that rolling back the salary of an office would prevent triggering the restrictions of the Ineligibility Clause. That year, President Carter appointed Senator Edmund Muskie to be Secretary of State. Legislation reduced the Secretary of State's salary to the level at which it had been prior to Muskie's existing Senate term. See Act of May 3, 1980, Pub. L. No. 96-241, 94 Stat. 343. The Senate confirmed Muskie with 94 votes, including that of Senator Byrd. 126 Cong. Rec. 10,279 (1980); see *id.* at 10,272-10,273 (statement of Sen. Byrd) ("[T]he State Department's gain is the Senate's loss. What matters is that the Nation continues to benefit from the services of Ed Muskie."). Only two Senators opposed Muskie's confirmation, and neither appeared to be motivated by Ineligibility Clause concerns, since both previously had voted in favor of confirming Saxbe. *Id.* at 10,279; see 119 Cong. Rec. at 42,018.

In 1993, President Clinton nominated Senator Lloyd Bentsen to be Secretary of Treasury, and Congress passed legislation reducing the salary of the Secretary to the level at which it had been at the beginning of Bentsen's term. See Act of Jan. 19, 1993, Pub. L. No. 103-2, 107 Stat. 4. Bentsen was confirmed as Secretary of the Treasury without opposition. 139 Cong. Rec. 388-389 (1993).[6]

In addition to the precedent set by Presidents Grant, Taft, Nixon, Ford, Carter, Clinton, and Obama of appointing one or more Members of Congress to Executive office under circumstances similar to the ones here, the Department of Justice has on numerous occasions en-

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[6] Contrary to appellant's suggestion (J.S. 32-34), the delays in the appointments of William Paterson to the Supreme Court and of Samuel Kirkwood to the post of tariff commissioner had nothing to do with the issue presented by this case. Those nominations were to newly created offices, not to offices whose emoluments had increased. See 119 Cong. Rec. at 38,316 (noting that Paterson's nomination was withdrawn "on the ground that [he] was a member of the Senate when the law creating that Office was passed") (internal quotation marks and citation omitted); 17 Op. Att'y Gen. 365 (1882) (noting that Kirkwood "was elected and qualified as Senator * * * for a term which would expire in March, 1883," and that "[s]ince then, by act of May 15, 1882, chapter 145, the office of tariff commissioner was created: *Advised* that the second clause of section 6 of the first article of the Constitution disqualifies K. for appointment to such office"). Those examples are thus covered by the other sub-part of the Ineligibility Clause barring appointment to offices "which shall have been created" during a Member's term. U.S. Const. Art. I, § 6, Cl. 2.

Appellant's reliance (J.S. 34-35) on the example of Senator Matthew Ransom's nomination is equally inapposite. In Ransom's case, Congress had raised the salary of the office to which he had been appointed and taken no action to repeal the increase. See 21 Op. Att'y Gen. 211, 214 (1895). The emoluments of the office thus were indisputably higher at the time of Ransom's nomination than at the beginning of his Senate term. *Ibid.*

dorsed the efficacy of legislation reducing the salary of an office as a means of complying with the Ineligibility Clause. Assistant Attorney General Charles Russell took this position with respect to the prospective appointment of Senator Knox, see 43 Cong. Rec. at 2402-2403, as did Acting Attorney General Robert Bork and Assistant Attorney General for OLC Robert G. Dixon with respect to the prospective appointment of Senator Saxbe, see S. Rep. No. 499, 93d Cong., 1st Sess. 5-7 (1973); *Hearing Before the Comm. on Post Office and Civil Service on S. 2673*, 93d Cong., 1st Sess. 8-16 (1973); *1973 Judiciary Comm. Hearing* 69-74. See also 3 Op. Off. Legal Counsel 298, 300 (1979) (Opinion 79-54); 3 Op. Off. Legal Counsel 286, 289-290 (1979) (Opinion 79-51).

As appellant points out (J.S. 29-30), Assistant Attorney General for OLC Charles Cooper reached the opposite conclusion in an unpublished 1987 memorandum. See *2009 OLC Op.* attachment (Memorandum for the Counselor to the Att'y Gen. from Charles J. Cooper, Asst. Att'y Gen., OLC, *Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987)). OLC has since concluded, however, that the 1987 opinion "was not in accord with the prior interpretations of [the Ineligibility] Clause by the Department of Justice" and does not "reflect[] the best reading of the Ineligibility Clause." *2009 OLC Op.* 1. After an extensive analysis of the text, original understanding, and purposes of the Clause, as well as the subsequent practice in applying it, OLC's conclusion is "that, where a salary increase for an office would otherwise create a bar to appointment of a member of Congress under the Ineligibility Clause, compliance with the Clause can be

achieved by legislation rolling back the salary of the executive office before the appointment." *Id.* at 14.

2. That is precisely what has happened here. Section 1(a) of the Emoluments Act fixes the Secretary's "compensation and other emoluments" at the level in effect before Secretary Clinton began her last term as a Senator. 122 Stat. 5036. On January 21, 2009, Senator Clinton was confirmed as Secretary of State by a 94-2 vote, and neither opposing Senator cited the Ineligibility Clause as a basis for his vote. See 155 Cong. Rec. S693 (daily ed. 2009).

The Emoluments Act addresses the concerns animating the enactment of the Ineligibility Clause (see pp. 19-21, *supra*) by ensuring that the compensation for the office of Secretary of State cannot be greater than when Secretary Clinton began her most recent Senate term. Contrary to appellant's suggestion (J.S. 21-23), the issue is not whether Congress has authority to "fix" a violation of the Ineligibility Clause. Rather, by rescinding an increase in the salary for the Secretary's office, the Emoluments Act prevents a violation of the Clause in the first place.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction in this Court. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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